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In The

Supreme Court of the United States

OCTOBER TERM 1971

No. 71 - 568

DAISY ALOMAR,

Petitioner,

vs.

WILLIAM F. DWYER, JULIAN H. ORR, EUGENE TENNIS, ANNE HASEN, JOSEPH SWEET, MYRON ZEITLER and EMILIO SERRANO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX OF RECORD ON CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX OF RECORD ON CERTIORARI

The petitioner Daisy Alomar prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action June 18, 1971.

Petitioner refers the court to *Perry et al. v. Sindermann,* in which this court granted certiorari in June 1971 (No. 70-36), *Kirkeı et al. v. Moore,* in which petition for certiorari has been filed in this court (No. 70-138), and *A.F.S.M.E. et al. v. Shapp et al.,* in which petitioner is advised a petition for certiorari to the Supreme Court of Pennsylvania may shortly be filed, all of which raise legal issues related to those here in factual contexts quite different and petitioner suggests that this court may wish to consider them together.

Opinion Below

The opinion of the Court of Appeals is set out in this petition's appendix at page 28a. So far as petitioner is aware, this opinion has not been published. No other opinion has been rendered in this case.

Jurisdiction

The judgment of the Court of Appeals was entered June 18, 1971, and is set out in the appendix at page 27a. Timely petition for rehearing was denied by the Court of Appeals July 23, 1971, and the petition and order of denial are set out at pages 31a and 35a. The order of the District Court for the Western District of New York was entered February 25, 1971, and is set out in the appendix at page 26a. The jurisdiction of this court is invoked under Title 28 U.S. Code section 1254 (1).

Questions Presented

1. Does the First Amendment right of association shield petitioner — a city employee not engaged in making policy and without apparent civil service tenure — from dismissal by a new city administration for the sole reason of her refusal to change political allegiance to that of the Republican Party newly in power?

2. May respondent city officials summarily fire petitioner without notice, charges or hearing where a First Amendment right of political association is involved?

3. Does the equal protection clause of the Fourteenth Amendment require the extension of any incidents of New York civil service tenure to the petitioner?

4. Does the petitioner have a federal cause of action against respondent municipal and political officials under 42

United States Code sections 1981, 1983 and 1985 (3) for firing her solely for refusing to switch political allegiance?

Constitutional, Statutory and Rules Provisions Involved

Provisions involved are:

United States Constitution, Amendments First and Fourteen, set out at page 14.

New York Constitution, Article I, Sections 8 and 9, set out at page 14.

New York Constitution, Article XIII, Section 2, set out at page 15.

United States Code, Title 42, Sections 1981, 1983 and 1985 (3) set out at page 15.

New York Civil Service Law, Sections 65 and 107, set out at page 17.

City of Rochester, N. Y., Charter, Article III, section 3-3, set out at page 22.

Federal Rules of Civil Procedure, Rule 56, set out at page 23.

Statement of the Case

The petitioner Daisy Alomar was an employee of the City of Rochester who was fired by a new city administration for refusal to change her party enrollment. She brought this action against city and political officials under the provisions of the Civil Rights Act of 1871, particularly 42 United States Code section 1983, seeking compensatory and punitive damages and injunctive relief.

The proceedings in the district court were limited to the filing of the complaint September 1, 1970 (1a) and at-

tempted discovery proceedings in behalf of petitioner (18a) followed on October 15, 1970 by motions in behalf of the respondents for summary judgment and to postpone discovery (6a and 11a). No answers were submitted by any respondents. The district court held that there were no issues of fact and respondents were as a matter of law entitled to summary judgment, by the order entered February 25, 1971 (26a).

The court of appeals unanimously affirmed the district court order. In a *per curiam* opinion the court stated:

> "The *Bailey* court teaches that the sole protection for government employees who have been dismissed for political reasons must be found in civil service statutes or regulations. We are not to be understood as saying, however, that in all circumstances may a provisional employee be summarily discharged. We made it clear in *Birnbaum v. Trussell*, 371 F. 2d. 672 (1966) that the discharge of a municipally employed doctor on charges of anti-Negro bias could rise to a violation of due process. We found that Dr. Birnbaum's discharge "involved (more) than merely the loss of the privilege of public employment" and noted that a "discharge for disloyalty . . . may involve legal rights as those in reputation and in eligibility for other employment." See also, *Pickering v. Board of Education*, 391 U.S. 563 (1968); *McLaughlin v. Telindis*, 398 F. 2d 287 (7th Cir. 1968); *Johnson v. Branch*, 364 F. 2d 177 (4th Cir. 1966); *Bomar v. Keyes*, 162 F. 2d 136 (2d Cir. 1947).
>
> The spoils system has been entrenched in American history for almost two hundred years. The devastating effect that such a system can wreak upon the orderly administration of government has been ameliorated to a large extent by the introduction of the various Civil Service laws. However, it is well understood that the victors will reap the harvest of those public positions still exempt from such laws. Indeed many such positions are exempt because a new administration taking office can only carry out

> its policies by replacing certain officeholders. If and when additional exempt positions are to be subject to civil service protection is a matter for action by the appropriate municipal and state authorities and not by a federal court."

A petition for rehearing was denied July 23, 1971, without opinion.

Statement of Facts

The facts relevant to this appeal are those set forth in the complaint (1a), except as modified by the affidavits submitted with the motions to dismiss (7a through 17a, especially at 7a). Daisy Alomar until May 1970 was a neighborhood service representative employed by the City of Rochester at an annual salary of about $10,000.00 a year. The respondents were persons who held municipal or political positions in May, 1970, e.g., the city manager, the city director of community relations, the Republican executive committee chairman for the County of Monroe (2a).

Between January — when the Republican city administration took office — and May of 1970 the petitioner's superiors including one or more respondents praised her performance of duties as entirely satisfactory (4a) and reappointed her to the position of neighborhood service representative in February of 1970 (10a) although she was a Democrat and this was known to respondent Republicans. Several of respondents on several occasions over a period of four months warned petitioner that they would have to fire her if she did not change her enrollment (3a and 4a). It is a fact central to this complaint that petitioner was fired because she took no heed of respondents' warnings and continued to exercise her right of free political association, remaining an enrolled Democrat (3a, 4a). On May 5, 1970 she was fired by respondent governmental officers at the

behest of respondent political officers for failure to switch her enrollment to Republican (4a). She was fired without notice from her employers, without charges, without a hearing and without justification (4a). All of these facts alleged in the complaint are deemed admitted by the motion to dismiss. Beyond these facts in the complaint, there is respondents' allegation that the petitioner's employment record card, ". . . . . shows the plaintiff at all times was a 'provisional employee' and as as such did not have 'protected status' under the Civil Service Law of the State of New York and therefore her employment was terminable at will. . . ." (7a and 8a).

Reasons for Granting the Writ

1. The judgment of the Second Circuit — that Aloma, summarily fired for political affiliation, was limited to state remedies based on civil service statutes and regulations and that her claim of violation of her right of political association was without any merit — is in conflict with decisions of this court concerning the right of political association and furthermore reflects a deep division among the circuits on two related questions. One is the degree of protection afforded to non-federal public employees who have no tenure and are fired for exercising constitutional rights. The other is the degree of protection afforded these employees summarily fired, without notice or hearing, regardless of the reasons for firing.

A. The right of political association in the United States has a long history, although there is no express provision for political associations in the Constitution; it is common knowledge that they became important adjuncts to democratic government early in the nation's history. Tocqueville

in 1835 wrote from his observations of the American experience:

> "Here I would repeat something which I have put in other words when speaking of municipal freedom: no countries need associations more — to prevent either despotism of parties or the arbitrary rule of a prince — than those with a democratic social state. In aristocratic nations secondary bodies form natural association which hold abuses of power in check. In countries where such associations do not exist, if private people did not artificially and temporarily create something like them, I see no other dike to hold back tyranny of whatever sort, and a great nation might with impunity be oppressed by some tiny faction or by a single man." *Democracy In America* (ed. by J. P. Mayer and Max Lerner, 1966) I, 177.

Of particular important here have been those political associations which became major political parties. The individuals' right to organize, to join and to manage a political party has long been recognized and protected. G. Abernathy, The Right of Assembly and Association, 173, 191 (1961); D. Fellman, The Constitutional Right of Association 38-39 (1963); C. Rice, Freedom of Association 100-01 (1962); C. Rice, The Constitutional Right of Association, 16 Hastings Law Journal 491, 500 (1965).

Recent decisions of this court hold the right of association to be within the First Amendment, protecting from Congressional abridgment freedom of speech and the right peaceably to assemble and to petition, and consequently within the Fourteenth Amendment's protection from state infringement. *Monroe v. Ogilvie*, 394 U.S. 814 (1969). *Williams v. Rhodes*, 393 U.S. 23 (1968). This is well expressed for example in the concurring opinion of Justices Black and Douglas in *Bates v. Little Rock*, 361 U.S. 516, 528 (1960). In this case the Supreme Court reversed the convictions of

N.A.A.C.P. officers for violating a local tax ordinance in refusing to furnish membership lists to the city clerk.

> "Moreover, we believe, as we indicated in *United States v. Rumely,* 345 U.S. 41, 48 at 56 (concurring opinion), that First Amendment rights are beyond abridgment either by legislation that directly restrains their exercise or by suppression or impairment through harassment, humiliation or exposure by government. One of these rights, freedom of assembly, includes of course freedom of association; and it is entitled to no less protection than any other First Amendment right as *N.A.A.C.P. v. Alabama,* 357 U.S. 449, at 460, and *DeJonge v. Oregon,* 299 U.S. 353, at 363, hold. These are principles applicable to all people under our Constitution irrespective of their race, color, politics or religion. That is, for us, the essence of the present opinion of the Court."

Last year two lower federal courts held that candidates for political office were entitled to injunctions against partisan use of public employees in political campaigns on the basis of the equal protection clause of the Fourteenth Amendment. *Shakman v. Democratic Organization,* 435 F 2d. 267 (7th Cir. 1970) (cert. denied 1971) and *White v. Snear et al,* 313 F. Supp. 1100 (E.D. Penn. 1970).

Against this development of the right of political association the judgment below stands out in stark contrast. The Second Circuit's reliance on the teaching of *Bailey v. Richardson,* 182 F. 2d. 46 (D.C. Cir. 1950), aff'd., 341 U.S. 918 (1951), serves to point up this issue in this application for certiorari. For in the case of Daisy Alomar we are concerned not only with the spoils system in operation, but also with the freedom of the political process in the mind of an individual, one of a large and growing number who are public employees. She contends that the Constitution gives her the right to offer her political allegiance where she will and that this right is so basic that respondents may not re-

strict it excepting for compelling reasons. The maintenance of the spoils system by the replacement of non-policy making employees by a party newly in power is not such a compelling reason.

B. With respect to the degree of protection or federal remedy afforded to state and local public employees having no tenure in their jobs from being fired for their exercise of constitutional rights, there is a deep and growing division among the circuits.

On the one hand are the circuits which have upheld causes of action brought by public employees claiming dismissal for exercising federal and usually constitutional rights. These include, for example, *Bomar v. Keyes,* 162 F. 2d. 136 (2nd Cir. 1947) (teacher fired for absences to serve on federal jury); *Birnbaum v. Trussell,* 371 F. 2d. 672 (2nd Cir. 1966) (physican fired for racial prejudice and claiming injury to professional reputation); *Johnson v. Branch,* 364 F. 2d. 177 (4th Cir. 1966) (teacher fired for civil rights activity); *Sindermann v. Perry,* 430 F. 2d. 939 (5th Cir. 1970) (college teacher fired for exercise of free speech) (cert. granted 1971 *sub. nom. Perry v. Sindermann*); *McLaughlin v. Telindis,* 398 F. 2d. 287 (7th Cir. 1968) (teacher fired for union activity).

On the other hand there are the circuits which have denied any federally cognizable causes of action brought by public employees claiming dismissal for exercising constitutional rights. These include:

Parker v. Board of Education, 348 F. 2d. 464 (4th Cir. 1965) (teacher fired for exercise of free speech); *Freeman v. Gould Special School District,* 405 F. 2d. 1153 (8th Cir. 1969) (teachers fired claiming racial discrimination); *Jones v. Hopper,* 410 F. 2d. 1323 (10th Cir. 1969) (college teacher fired for exercise of free speech).

C. With respect to the degree of protection or federal remedy afforded to state and local public employees having no tenure from summary dismissal, without notice or hearing, there is a deep and growing division among the circuits. This issue was touched on in oral argument below although not briefed there.

On the one hand are varying due process requirements among the circuits. The First Circuit has held that a non-tenured teacher is entitled to have prior to dismissal a statement in writing of the reasons for dismissal. *Drown v. Portsmouth School District,* 435 F. 2d 1182 (1st Cir. 1970). The Fifth and Seventh Circuits have held that notice and hearing are required prior to dismissal. *Sindermann,* above. *Roth v. Board of Regents,* 310 F. Supp. 972 (D. Wisc. 1970), aff'd., No. 18490, (7th Cir., July 1, 1971).

On the other hand, the Fourth, Sixth and Eighth Circuits have held that neither notice nor hearing prior to dismissal of non-tenured public employees is required. *Parker* and *Freeman,* above. *Orr. v. Trinter,* No. 20721 6th Cir., June 16, 1971) petition for certiorari pending, No. 71-249.

2. Another significant issue raised below is the construction of New York civil service laws applicable to the Alomar case. The current state of applicable New York civil service laws is unclear, although respondent city officials argued below that the petitioner was a provisional employee and her status was unprotected and terminable at will. The New York civil service statutes and cases on the attributes of provisional appointments controvert the simple conclusion that provisional appointments are terminable at will:

1. Provisional appointments are within the classified competitive civil service (section 65, Civil Service Law), are limited to nine months (section 65, paragraph 2) and

may not be renewed unless a competitive examination fails to produce a list adequate to fill the available positions on a permanent basis (section 65, paragraph 4).

2. As a general rule, provisional employees are subject to summary dismissal, e.g., *Benon v. LaGuardia,* 285 N.Y. 560 (1941); *Matter of Riggi v. Blessing,* 9 App. Div. 2d 423, 195 N.Y.S. 2d 971 (3rd Dept. 1959), aff'd 10 N.Y. 2d 917, (1962).

3. But civil service employees may not be removed by reason of their political opinions or affiliations. Section 107, paragraph 1. See *Matter of Tischler v. Board of Education,* 37 A.D. 2d 261 (2nd Dept. 1971) (holding teacher had cause of action under New York education and other laws on claim that she was denied tenure "solely in retaliation for the exercise of constitutional rights" at p. 265).

4. It has been held that job holders improperly excluded from a competitive examination were entitled to temporary reinstatement and permit them to take a special examination. *Rindone v. Kern,* 282 N.Y. 214 (1940).

In addition three provisions of the New York Constitution are relevant: Article 1, section 8, which provides for the right of free speech and section 9, which provides for the rights to petition and assemble; and Article XIII, section 2, which provides that any office the duration of which is not specified by law shall be held during the pleasure of the appointing authority. Also relevant is the Rochester city charter which provides in Article III, section 3-3, that the city manager is authorized to remove subordinate employees except as otherwise provided in the charter.

New York's civil service laws provide two bases for protection of petitioner as a provisional public employee. One is the prohibition against removal from office because of political opinions or affiliations. Section 107 paragraph

1. Two is the duty of the municipal civil service commission to order a prompt civil service examination for any position held by provisional appointment. Section 65 paragraph 2. The firing of petitioner for refusing to switch political allegiance violates section 107. The employment of petitioner as a provisional employee for over two years without offering or requiring a civil service examination (see pages 7a—10a) violates section 65: this maintenance of employees in the provisional category beyond the statutory limit of nine months (section 65 paragraph 2) has the effect of keeping public employees subservient to the party in power in violation of the civil service laws.

If the New York civil service laws were construed to permit the summary dismissal of petitioner as a provisional employee, those laws so construed would be discriminatory in violation of the equal protection clause of the Fourteenth Amendment.

3. Another point made before the Second Circuit was that the federal courts had jurisdiction of the causes of action brought by Daisy Alomar by reason of sections 1981, 1983 and 1985 (3) of Title 42, United States Code. Reference should also be made to 28 United States Code sections 1331 and 1343 (3). Since the Alomar complaint clearly alleges a deprivation of a federal constitutional right by respondents under color of state law, it states a *prima facie* cause of action. The respondents' motion for summary judgment should have been denied therefore.

Conclusion

For the reasons stated this petition for writ of certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT [1]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT [14]

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK CONSTITUTION

Article I, Section 8

[Freedom of speech and press; criminal prosecutions for libel.] — Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions or indictments for libels, the truth

may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

Article I, Section 9

[Right to assemble and petition; divorce; lotteries; pool-selling and gambling; laws to prevent.]—1. No law shall be passed abridging the rights of the people peaceably to assemble and to petition the government, or any department thereof...

Article XIII, Public Officers Section 2

(Duration of term of office.) — When the duration of any office is not provided by this constitution it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment.

UNITED STATES CODE — TITLE 42

§ 1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens and shall be subject to like punishment, pains, penalities, taxes, licenses, and exactions of every kind, and to no other. (R.S. § 1977.)

§ 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. (R.S. § 1979.)

§ 1985. Conspiracy to interfere with civil rights.

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal proection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right

or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R. S. § 1980.)

New York Civil Service Law

Section 65

Provisional appointments.—1. Provisional appointments authorized. Whenever there is no appropriate eligible list available for filling a vacancy in the competitive class, the appointing officer may nominate a person to the state civil service department or municipal commission for non-competitive examination, and if such nominee shall be certified by such department or municipal commission as qualified after such non-competitive examination, he may be appointed provisionally to fill such vacancy until a selection and appointment can be made after competitive examination. Such non-competitive examination may consist of a review and evaluation of the training, experience and other qualifications of the nominee, without written, oral or other performance tests.

2. Time limitation on provisional appointments. No provisional appointment shall continue for a period in excess of nine months. The civil service department shall for competitive positions within its jurisdiction, and a municipal civil service commission shall for competitive positions within its jurisdiction, order a civil service examination for any position held by provisional appointment for a period of one month and such department or commission shall conduct a civil service examination, or see that such an examination is conducted, as soon as practicable thereafter, in order to prevent the provisional appointment from continuing for a period in excess of nine months.

3. Termination of provisional appointments. A provisional appointment to any position shall be terminated within two months following the establishment of an appropriate eligible list for filling vacancies in such positions; provided, however, that where there are a large number of provisional appointees in any department or agency in the service of the state or any civil division thereof to be replaced by permanent appointees from a newly established eligible list, and the appointing officer or body deems that the termination of the employment of all such provisional appointees within two months following establishment of such list would disrupt or impair essential public services, evidence thereof may be presented to the civil service department or municipal commission having jurisdiction which, after due inquiry, and upon finding that it is in the best interest of the public service, may waive the provisions of this subdivision requiring the termination of the employment of provisional appointees within two months following the establishment of an appropriate eligible list and authorize the termination of the employment of various numbers of such provisional appointees at stated intervals prescribed by such commission; provided, however, that in no case shall the employment of any such provisional appointee be continued longer than four months following the establishment of such eligible list.

4. Successive provisional appointments. Successive provisional appointments shall not be made to the same position after the expiration of the authorized period of the original provisional appointment to such position; provided, however, that where an examination for a position or group of positions fails to produce a list adequate to fill all positions then held on a provisional basis, or where such list is exhausted immediately following its establishment, a new provisional appointment may be made to any such

position remaining unfilled by permanent appointment, and such new provisional appointment may, in the discretion of the appointing authority, be given to a current or former provisional appointee in such position, except that a current or former provisional appointee who becomes eligible for permanent appointment to any such position shall, if he is then to be continued in or appointed to any such position be afforded permanent appointment to such position.

Section 107

Prohibition against certain political activities; improper influence.—1. Recommendations based on political affiliations. No recommendation or question under the authority of this chapter shall relate to the political opinions or affiliations of any person whatever; and no appointment or selection to or removal from an office or employment within the scope of this chapter or the rules established thereunder, shall be in any manner affected or influenced by such opinions or affiliations. No person in the civil service of the state or of any civil division thereof is for that reason under any obligation to contribute to any political fund or to render any political service, and no person shall be removed or otherwise prejudiced for refusing so to do. No person in the said civil service shall discharge or promote or reduce, or in any manner change the official rank or compensation of any other person in said service, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or service or any other valuable thing for any political purpose. No person in said service shall use his official authority or influences to coerce the political action of any person or body or to interfere with any election.

2. Inquiry concerning political affiliations. No person shall directly or indirectly ask, indicate or transmit orally or in writing the political affiliations of any employee in the civil service of the state or of any civil division thereof or of any person dependent upon or related to such an employee, as a test of fitness for holding office. A violation of this subdivision shall be deemed a misdemeanor and conviction thereof shall subject the person convicted to a fine of not less than one hundred dollars nor more than five hundred dollars or to imprisonment for not less than thirty days nor more than six months, or to both such fine and imprisonment. Nothing herein contained shall be construed to prevent or prohibit inquiry concerning the activities, affiliation or membership of any applicant or employee in any group or organization which advocates that the government of the United States or of any state or of any political subdivision thereof should be overturned by force, violence or any unlawful means.

3. Political assessments. No officer or employee of the state or any civil division thereof shall, directly or indirectly, use his authority or official influence to compel or induce any other officer or employee of the state or any civil division thereof, to pay or promise to pay any political assessment, subscription or contribution. Every officer or employee who may have charge or control in any building, office or room occupied for any governmental purpose is hereby authorized to prohibit the entry of any person, and he shall not knowingly permit any person to enter the same for the purpose of making, collecting, receiving or giving notice therein, of any political assessment, subscription or contribution; and no person shall enter or remain in any such office, building or room, or send or direct any letter or other writing thereto, for the purpose of giving notice of, demanding or collecting a political assessment; nor shall

any person therein give notice of, demand, collect or receive any such assessment, subscription or contribution. No person shall prepare or take any part in preparing any political assessment, subscription or contribution with the intent that the same shall be sent or presented to or collected of any officer or employee subject to the provisions of this chapter, and no person shall knowingly send or present any political assessment, subscription or contribution to or request its payment of any said officer or employee. Any person violating any provision of this subdivision shall be guilty of a misdemeanor.

4. Prohibition against promise of influence. Any person, who while holding any public office, or in nomination for, or while seeking a nomination or appointment for any public office, shall corruptly use or promise to use, whether directly or indirectly, any official authority or influence, whether then possessed or merely anticipated, in the way of conferring upon any person, or in order to secure or aid any person in securing any office or public employment, or any nomination, confirmation, promotion or increase of salary, upon the consideration that the vote or political influence or action of the last-named person, or any other, shall be given or used in behalf of any candidate, officer or party, or upon any other corrupt condition or consideration, shall be deemed guilty of bribery or an attempt at bribery. Any public officer, or any person having or claiming to have any authority or influence for or affecting the nomination, public employment, confirmation, promotion, removal, or increase or decrease of salary of any public officer, who shall corruptly use, or promise, or threaten to use any such authority or influence, directly or indirectly in order to coerce or persuade the vote or political action of any citizen or the removal, discharge or promotion of any officer or

public employee, or upon any other corrupt consideration, shall also be guilty of bribery or of an attempt at bribery. Every person found guilty of such bribery, or an attempt to commit the same, as aforesaid, shall, upon conviction thereof, be liable to be punished by a fine of not less than one hundred dollars nor more than three thousand dollars, or to imprisonment for not less than ten days nor more than two years, or to both such fine and imprisonment in the discretion of the court.

ROCHESTER CHARTER

Sec. 3-3. Powers and duties of Manager

The City Manager shall be responsible to the Council for the administration of all city affairs. He shall have the power and it shall be his duty:

A. To see that all laws and ordinances are enforced.

B. To appoint and remove the heads of all departments, the members of all boards, and all subordinate officers and employees, except as otherwise provided in this local law.

C. To exercise Supervision and control over all administrative departments, the heads of which he appoints.

****

K. To prescribe and authorize the appointment of all subordinates, except in cases in which power to make such prescription and/or authorization is conferred by law on some other board, body or official.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 56

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the plead-

ings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken

or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

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Relevant Docket Entries in District Court

Sept. 1, 1970	Filed Complaint and Demand for Jury Trial
Sept. 17, 1970	Filed summons — served defts. Serrano, Dwyer, Tennis and Orr on 9/3/70, deft. Hasen on 9/9/70, deft. Sweet on 9/10/70 and deft. Zeitler on 9/15/70

Oct. 15, 1970	Filed defts'. Notice of Motion to Dismiss the Complaint or for Summary Judgment and for an Order Enlarging Time to Respond to Interrogatories and Requests to Produce—ret. 11/9/70 at Roch; adj. to 11/23/70
Oct. 21, 1970	Filed pltf's. Notice of Motion for an Order Directing Immediate Response to Request to Produce & Interrogatory—ret. 10/26/70 at Roch.—subm., memos to be subm. by pltf. 10/29 & by defts. 10/30/70
Nov. 18, 1970	Filed defts'. Affidavit, Notice of Motion for a Protective Order & Motion for a Protective Order—ret. 12/14/70 at Roch. —Denied
Feb. 25, 1971	Filed Decision granting Defts'., summary judgment dismissing complaint—Burke, J. (notice to Messrs. Phelosof, Willis & Harris, Beach, etc.)
March 10, 1971	Filed Pltf's. Notice of Appeal (copy mailed to Messrs. Willis and Hartman) 1st form letter mailed 3/10/71

PROCEEDINGS IN COURT OF APPEALS

Opinion

Judgment

Petition for rehearing

Order denying petition for rehearing

Clerk's certificate of record in Court of Appeals

IN THE

United States District Court

For The Western District Of New York

DAISY ALOMAR,

Plaintiff,

vs.

WILLIAM F. DWYER, JULIAN H. ORR, EUGENE TENNIS, ANNE HASEN, JOSEPH SWEET, MYRON ZEITLER and EMILIO SERRANO,

Defendants.

COMPLAINT

Civil Action No. 1970-388

Jury Trial Requested

The plaintiff for her complaint alleges that:

1. She invokes the jurisdiction of this court under the Fourteenth Amendment to the United States Constitution, Title 42 United States Code sections 1979, 1981, 1983 and 1985, and Title 28 United States Code section 1331.

2. The matter in controversy exceeds the sum or value of $10,000.00, exclusive of interest and costs.

3. The plaintiff, Daisy Alomar, is a citizen of the state of New York and of the United States; she resides in the city of Rochester, New York.

4. At all the times mentioned in this complaint the plaintiff is and was duly registered to vote in the general elec-

tions for officers of the city, county, state and nation and enrolled at the Monroe County Board of Elections as a member of the Democratic Party.

5. Until May, 1970, the plaintiff was employed by the city of Rochester as a community relations representative at a salary in excess of $10,000.00 a year. Her duties included counseling and aiding individuals and groups, particularly Spanish speaking, in their dealings with the city government, other governmental and also private agencies.

6. The defendants are, on information and belief, all residents of the county of Monroe, citizens of the state of New York and of the United States and holders of political or governmental offices in the city or county.

7. The defendants and, on information and belief, their offices are:

a. William F. Dwyer, who is and since March or so, 1970, has been chairman of the Republican Executive Committee of Monroe County.

b. Julian H. Orr, who is and has been the city manager since the latter part of April, 1970.

c. Eugene Tennis, who is and has been the city's director of community relations since the beginning of January, 1970.

d. Anne Hasen, who is and has been since March or so, 1970, an employee of the city bureau of budget and efficiency and the liaison between the city and defendant Dwyer and his staff on matters involving hiring and firing city employees.

e. Joseph Sweet, who was the Fifth Ward Republican executive committeeman until June or so, 1970.

f. Myron Zeitler, who is and has been Fifth Ward Republican executive committeeman since Sweet.

g. Emilio Serrano, who is and has been a Republican member of the board of education of the city school district since the beginning of January, 1970, and for several years to the present time an employee of the Monroe County Family Court.

8. This is an action to obtain in favor of plaintiff

a. preliminary and permanent orders directing defendants to refrain from any and all actions and statements tending in any way to abridge, destroy or diminish plaintiff's rights, privileges and immunities, including right of free political association; and

b. a judgment for damages compensatory and punitive against all the defendants jointly and severally for wilfully and maliciously depriving plaintiff of federally protected rights and for other damages.

9. The defendants Serrano, Sweet and Zeitler and others had between January and May, 1970, informed, warned and threatened the plaintiff with dismissal from her employment unless she changed her political enrollment from Democratic to Republican and in other ways complied with partisan requirements of members of the Republican party and particularly these defendants, both in the performance of her duties as a city employee and as a private citizen.

10. The plaintiff nevertheless continued her enrollment as a Democrat; she continued to perform her duties conscientiously and competently and without regard to the narrow, improper and unjustifiable partisan requirements of defendants.

11. On several occasions after January 1, 1970, she was informed by her superiors in the city administration, including at least one of the defendants, Tennis, that her performance of her duties was entirely satisfactory.

12. On May 5, 1970, defendants Orr and Tennis fired the plaintiff although satisfactorily performing her duties, and they did so without notice, without informing her of any charges or cause, without any hearing and without justification.

13. On information and belief, the dismissal of plaintiff by defendants Orr and Tennis was effected by defendants Serrano, Sweet and Zeitler through and with defendants Dwyer and Hasen and may have involved still others, unknown to plaintiff.

14. The plaintiff was dismissed solely because she had failed and refused to change her enrollment to Republican and otherwise comply with improper and unjustifiable partisan requirements.

15. These defendants and others, individually and together, did, wilfully and under color of law, statute, ordinance, regulation, custom or usage, in their capacities as governmental or political officers deprive the plaintiff of her rights, privileges and immunities, particularly but not limited to her right of free political association and suffrage; rights, privileges and immunities secured by the federal Constitution and laws and guaranteed to every citizen including the plaintiff, to her damage in the sum of $250,000.00 By reason of these facts this court has jurisdiction under sec. 1983 of Title 42, U.S.C.

16. By reason of the foregoing the plaintiff was, moreover, deprived of her rights and property without due pro-

cess of law in contravention of the Fourteenth Amendment of the federal Constitution.

17. For a second cause of action, the plaintiff realleges all of the foregoing allegations.

18. She alleges further that the defendants, other than Orr and Tennis, have wrongfully and purposely and without justification or privilege induced or caused the defendants Orr and Tennis to break the employment contract between the city and the plaintiff by wrongfully and without justification firing the plaintiff as previously described, all to the plaintiff's damage in the sum of $250,000.00.

19. For a third cause of action, the plaintiff realleges all of the foregoing allegations.

20. She alleges further that the defendants Orr and Tennis as the result of the tortious inducements or other cause by the other defendants did without justification or provocation and in gross violation of the terms and conditions of the plaintiff's employment contract with the city wrongfully fire the plaintiff as previously described, all to the plaintiff's damage in the sum of $250,000.00.

Wherefore the plaintiff prays that the defendants be summoned to appear and answer herein and that plaintiff have judgment as set forth in paragraphs 8, 15, 18 and 20 of this complaint and such other and further relief as she may show herself justly entitled to receive.

NOTICE OF MOTION BY DEFENDANTS, ORR, TENNIS AND HASEN TO DISMISS THE COMPLAINT, ETC.

(SAME TITLE)

PLEASE TAKE NOTICE that upon the Complaint herein and the affidavit of A. Vincent Buzard, the undersigned will move this Court in the Federal Building, City of Rochester, New York, on the 9th day of November, 1970, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order dismissing the Complaint herein against Julian H. Orr, Eugene Tennis, and Anne Hasen on the ground that the same failed to state a claim upon which relief can be granted or in the alternative, for summary judgment on the ground that there is no genuine issue as to any material fact and that defendants, Julian H. Orr, Eugene Tennis and Anne Hasen are entitled to judgment as a matter of law; and for an Order enlarging the aforesaid defendants' time to respond or to otherwise move with respect to the Interrogatory and Requests to Produce served upon said defendants by plaintiff.

MOTION TO DISMISS***

(SAME TITLE)

Defendants, Julian H. Orr, Eugene Tennis and Anne Hasen, move the Court under Rule 12(b) (6), Rules of Civil Procedure, to dismiss the action because the Complaint fails to state a claim upon which relief can be granted or, in the alternative, to grant summary judgment for the aforesaid defendants under Rule 56, Rules of Civil Procedures, on the ground that there is no genuine issue as to any material fact as more particularly appears from the

affidavit of A. Vincent Buzard, annexed hereto as Exhibit "A".

Defendants, Julian H. Orr, Eugene Tennis and Anne Hasen also move under Rule 6, Rules of Civil Procedure for an Order enlarging the aforesaid defendants' time to respond or to otherwise move with respect to the Interrogatories and Requests to Produce served upon defendants by plaintiff.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS****

(SAME TITLE)

A. VINCENT BUZARD, being duly sworn, deposes and says:

1. That he is First Assistant Corporation Counsel for the City of Rochester and as such is associated with Charles L. Willis, Corporation Counsel, and Attorney for the defendants Julian H. Orr, Eugene Tennis, and Anne Hasen.

2. That he is familiar with the pleadings and proceedings herein and that he makes this affidavit in support of these motions for dismissal or summary judgment and order for enlargement.

3. That annexed hereto and made a part of this affidavit and marked Exhibit "A" is the employment record of Daisy Alomar.

4. That upon information and belief Daisy Alomar's employment with the City of Rochester was terminated on or about May 8, 1970.

5. That said employment record shows that the plaintiff at all times was a "provisional employee' and as such

did not have "protected status" under the Civil Service Law of the State of New York and therefore her employment was terminable at will and she was not entitled to any notice of any charge nor to a hearing.

6. That there was no contract of employment, written or oral, between the City of Rochester and the plaintiff, and that the plaintiff was therefore an employee terminable at will pursuant to Charter of the City of Rochester, Article 3 and the Constitution of the State of New York, Article 13, Section 2.

7. That under the Civil Service Law of the State of New York any contract of employment with a provisional employee would have been illegal in that Section 65 of the Civil Service Law provides that "no provisional appointment shall continue for a period in excess of nine months."

8. That on information and belief there is no Section 1979 of Title 42, United States Code pursuant to which section plaintiff invokes the jurisdiction of this Court.

9. That Title 42, United States Code Section 1981 states:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

10. That the plaintiff on or about September 21, 1970, served the defendants, Julian H. Orr, Eugene Tennis and Anne Hasen, with Notices to Produce pursuant to Rule 34

of the Federal Rules of Civil Procedure and Interrogatories, pursuant to Rule 33 of the Federal Rules of Civil Procedure.

11. That the responses to said discovery devices may be rendered irrelevant in the event that this motion is decided in favor of the defendants and in the event the motions are denied, the plaintiff will in no way be prejudiced by receiving the responses after the determination of the motions.

12. That in addition to an order dismissing the complaint on the merits, or an order granting summary judgment in favor of the defendants, the defendants also seek an order enlarging the time to respond to the Notices to Produce and Interrogatories pursuant to Rule 6 of the Federal Rules of Civil Procedure.

A. VINCENT BUZARD

EXHIBIT "A"

NAME Alomar, Daisy

ADDRESS 30 Eiffel Place (21)

DATE OF BIRTH 4/20/40

DATE	CODE	POSITION	DEPT OF	RANGE	ANNUAL SALARY
10/ 2/67	6-C	Sr. Stenographer-BiLingual Term: 4/27/68 — 1 week vac.	Cty. Mgr.-Comm. Rel.	7-5	5356.
8/ 5/68	7-C	Assistant Neighborhood Service Representative	City Manager	Br. 15-5	$8242.
6/23/69		New Schedule		15-5	8580.
9/15/69	7-C	Neigh. Services Representative	City Manager	Br. 20-4	10,426.
2/16/70	7-C	Neigh. Service Representative Local Law—Section 3-11	Cty. Mgr.-Comm. Rel.	Br. 20-4	$10,426.
		Resigned 5/8/70—Acc. vac. 10 days			

CODE:—APPOINTMENT (1), PROMOTION (2), TRANSFER (3), REMOVAL (4), REINSTATEMENT (5), TEMPORARY APPOINTMENT (6), CAUSE OF REMOVAL (7), PROVISIONAL APPOINTMENT (7)

L-LETTER
M MINUTES

CS-815

CIVIL SERVICE COMMISSION, ROCHESTER, N. Y.

10a

NOTICE OF MOTION BY DEFENDANTS DWYER, SWEET, ZEITLER AND SERRANO TO DISMISS COMPLAINT, ETC.

(SAME TITLE)

PLEASE TAKE NOTICE, that the undersigned will bring on the annexed motion to dismiss complaint or for summary judgment and to enlarge the time to answer or otherwise move with respect to the interrogatory and request to produce for hearing before this Court, in the Federal Building, City of Rochester, New York on the 9th day of November, 1970, at 10:00 in the forenoon of that day, or as soon thereafter as counsel can be heard.

MOTION TO DISMISS COMPLAINT***

(SAME TITLE)

Defendants William F. Dwyer, Joseph Sweet, Myron Zeitler and Emilio Serrano move the court as follows:

That it enter, pursuant to Rule 12 (b) (6) and Rule 56 of the Federal Rules of Civil Procedure, an order dismissing the action herein because the complaint fails to state a claim against said defendants upon which relief can be granted or, in the alternative, a summary judgment for the aforesaid defendants on the ground that there is no genuine issue as to any material fact.

That it enter, pursuant to Rule 6 (b) of the Rules of Civil Procedure, an order enlarging the time of defendants William F. Dwyer, Joseph Sweet, Myron Zeitler and Emilio Serrano to answer or otherwise move with respect to the interrogatory and request to produce served upon said defendants by plaintiff.

This motion is based upon:

a) the complaint herein;
[Omitted here. Set out at Page 1a.]

b) interrogatory;

c) request to produce; and

d) the affidavit of James M. Hartman

INTERROGATORY

(SAME TITLE)

The plaintiff requests pursuant to Rule 33 of the Federal Rules of Civil Procedure that each one of the defendants in this action answer under oath the following interrogatories:

1. Describe sufficiently to identify to the plaintiff any files, documents, notes, minutes, memoranda and other writings, in any language, in shorthand or stenotype, as well as any records on tape, film or other media which are relevant to (a) any and all actions, communications, discussions, recommendations and decisions concerning the employment of Daisy Alomar as community relations representative and termination of that employment in May of 1970; (b) any and all actions, communications, discussions, recommendations and decisions concerning the employment of Santa Rosa as community relations representative; (c) any and all communications, representations and liasons between officials of the City of Rochester and officials of the Republican County Committee of Monroe County, particularly its headquarters, Fifth Ward and Spanish speaking officers, pertinent to employment by the

city and criteria, standards and mechanics of decision and selection as to this employment affecting Daisy Alomar or Santa Rosa.

2. State as to each of the foregoing answers in whose possession and under whose control there are presently located originals and copies.

PLEASE TAKE NOTICE that a copy of these answers must be served upon the undersigned within thirty days after the service of these interrogatories.

Dated: September 18, 1970.

REQUEST TO PRODUCE

(SAME TITLE)

The plaintiff requests pursuant to Rule 34 of the Federal Rules of Civil Procedure that the defendants Julian H. Orr, Eugene Tennis and Anne Hasen produce and permit the plaintiff to inspect and to copy the following files, documents and memoranda:

Personnel files of Daisy Alomar and Santa Rosa, including but not limited to applications for the position of community relations representative, qualifications and experience, references and recommendations, descriptions of their duties, performance ratings, rates of pay, any and all matters bearing on the firing of Daisy Alomar and on the hiring of Santa Rosa.

Any and all rules and regulations of a general nature pertinent to the hiring and firing of city employees, to the performance of their jobs, to promotion, transfer, discipline and suspension.

The memorandum of May 7, 1970 on the subject of liaison between city officials and Republican Party officials in reference to employment in positions paying more than $8,000.00 a year, prepared by the defendant Hasen and based on a meeting of City and Republican officials on or about April 22, 1970.

Any and all notes, memoranda or other matters in the possession of or under the control of these defendants made at or relating to that meeting of April 22, 1970.

It is requested that the above described files, documents, etc. be produced on October 21, 1970, at 10:00 a.m. in the Council Chamber at City Hall, Rochester, New York. Inspection will be made by the plaintiff and her attorney and copies will be made of desired documents by xerography.

Dated: September 18, 1970.

AFFIDAVIT IN SUPPORT OF THE MOTION

(SAME TITLE)

JAMES M. HARTMAN being duly sworn deposes and says:

1. Deponent is a member of the firm of Harris, Beach and Wilcox, attorneys for defendants William F. Dwyer, Joseph Sweet, Myron Zeitler and Emilio Serrano and as such he is fully familiar with the facts and circumstances herein.

2. Deponent has read the affidavit of A. Vincent Buzard, the attorney for other defendants herein in support of this motion and to the best of deponent's knowledge the matters set forth in said affidavit are true.

3. As set forth in the aforesaid affidavit of A. Vincent Buzard, the plaintiff herein, Daisy Alomar, was at all times during her employment by the City of Rochester a provisional employee without contract with the City of Rochester.

4. Section 3-3 of the Charter of the City of Rochester states that the City Manager shall have the power and it shall be his duty:

> B. To appoint and remove the heads of all departments, the members of all boards, and all subordinate officers and employees, except as otherwise provided in this local law.

5. Article 13 § 2 of the Constitution of the State of New York states that:

> When the duration of any office is not provided by this constitution it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment.

6. Pursuant to the aforesaid provisions of the Charter of the City of Rochester and the Constitution of the State of New York, plaintiff's employment by the City of Rochester was terminable at the will of the City of Rochester.

7. As set forth in the aforesaid affidavit of A. Vincent Buzard, plaintiff was a provisional employee of the City of Rochester pursuant to §65 of the Civil Service Law and as such was not entitled to a hearing upon stated charges setting forth the reasons for her dismissal.

8. On information and belief based on the aforesaid affidavit of A. Vincent Buzard, plaintiff was dismissed from the employ of the City of Rochester on or about May 8, 1970.

9. Plaintiff alleges that defendants William F. Dwyer, Joseph Sweet, Myron Zeitler and Emilio Serrano wrongfully induced defendants Julian H. Orr and Eugene Tennis to break an employment contract between the City of Rochester and the plaintiff. As set forth hereinabove, the City of Rochester had the right to dismiss plaintiff at any time, without cause given. The plaintiff's dismissal by the City did not subject her to the deprivation of any rights, privileges or immunities secured to her by the Constitution and laws of the United States. Consequently, as a matter of law, defendants William F. Dwyer, Joseph Sweet, Myron Zeitler and Emilio Serrano could not have caused plaintiff to be subjected to the deprivation of any rights, privileges or immunities secured to her by the Constitution and laws of the United States.

10. On information and belief there is no §1979 of Title 42 United States Code pursuant to which section plaintiff invokes the jurisdiction of this Court.

11. Title 42, United States Code §1981 states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Deponent verily believes that plaintiff cannot invoke the jurisdiction of this Court pursuant to the aforesaid §1981 since no facts exist and no allegations are made in the complaint with respect to the denial of equal rights under the

law because of race. No allegations with respect to plaintiff's race are set forth in the complaint.

12. On or about September 21, 1970 defendants William F. Dwyer, Joseph Sweet, Myron Zeitler and Emilio Serrano were served with an Interrogatory pursuant to Rule 33 of the Federal Rules of Civil Procedure and a Request to Produce pursuant to Rule 34 of the Federal Rules of Civil Procedure.

13. Responses to said demands for discovery will be irrelevant and unnecessary if the motion to dismiss or for summary judgment is granted. In the event the aforesaid motion is denied, plaintiff will in no way be prejudiced if the time to respond to the demands for discovery is extended until after decision on the motion.

WHEREFORE your deponent respectfully prays that this Court grant the motion of defendants William F. Dwyer, Joseph Sweet, Myron Zeitler and Emilio Serrano to dismiss the complaint herein for failure to state a claim against the aforesaid defendants upon which relief can be granted, or in the alternative to grant summary judgment for said defendants on the ground that there is no genuine issue as to any material fact and in addition to enlarge the time for the aforesaid defendants to respond or to otherwise move with respect to the Interrogatory and Request to Produce, together with the costs of this motion.

JAMES M. HARTMAN

NOTICE OF MOTION BY PLAINTIFF TO REQUIRE IMMEDIATE RESPONSE TO INTERROGATORY

(SAME TITLE)

PLEASE TAKE NOTICE, that the undersigned will bring on the annexed motion for an order directing the defendants forthwith to respond to the request to produce and interrogatory, for hearing before this court in the Federal Building, City of Rochester, New York, on the 26th day of October, 1970, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

MOTION FOR AN ORDER DIRECTING IMMEDIATE RESPONSE •••

(SAME TITLE)

The plaintiff moves the court, pursuant to Rules 33, 34 and 37 (a) of the Federal Rules of Civil Procedure, for an order directing each of the defendants to respond forthwith to the interrogatory, dated September 18, 1970, and for an order directing the defendants Orr, Tennis and Hasen forthwith to produce and permit the plaintiff to inspect and copy the files, documents and memoranda itemized in the notice, dated September 18, 1970.

This motion is based upon:

(a) the affidavit of plaintiff's attorney

(b) the interrogatory

(c) the request to produce

[Omitted here. Set out at page 12a and 13a respectively.]

Items (d), (e) and (f) are incorporated into these moving papers by reference:

(d) the complaint previously served on the defendants

(e) the motion papers served by Charles L. Willis, attorney for three defendants, on October 14, 1970

(f) the motion papers served by Harris, Beach and Wilcox, attorneys for the remaining defendants, on October 14, 1970.

The reason for this motion is that the subject matter sought by plaintiff's prior discovery notices is not only relevant to the ground for dismissal stated in subsequent defense motions, but may be important, perhaps crucial, to the determination of those motions. This more clearly appears in the annexed affidavit.

AFFIDAVIT OF PLAINTIFF'S ATTORNEY

(SAME TITLE)

Benjamin Phelosof being duly sworn deposes and says that:

1. I am the attorney for the plaintiff in this action and am familiar with the facts and circumstances.

2. This is an action for damages and other relief flowing from the dismissal of plaintiff in May, 1970, from her position with the City of Rochester.

3. The plaintiff has alleged that this dismissal constitutes a deprivation under color of law, etc. of her rights, privileges and immunities secured by the federal Constitution and laws.

4. The summonses and complaints were served on all defendants in the first half of September, 1970. Their times to answer would have expired by October 5, 1970, but was extended by plaintiff at request of defense counsel to October 14, 1970.

5. On October 14, 1970, defense motions returnable November 9, 1970, were served on plaintiff's attorney. These motions requested an order dismissing the complaint or summary judgment and to enlarge the time to answer or otherwise move with respect to the interrogatory and request to produce records previously served by plaintiff.

6. The ground for dismissal or summary judgment advanced by defendants is that the plaintiff is alleged to have been a provisional employee of the City, subject to termination at will, without any notice and without any hearing.

7. The plaintiff's request to produce for inspection and copy was addressed to the defendants who are officers of the City: it gave the place and time as the City Hall on October 21, 1970 at 10:00 a.m. and it listed the following items: the personnel files of the plaintiff and of the replacement in her position, Santa Rosa, the rules and regulations of the City pertinent to the hiring and firing of city employees, the memorandum of May 7, 1970, concerning liaison between city and Republican Party officials on the subject of city employment, etc. A copy of this notice is attached to this affidavit.

8. The plaintiff also requested each defendant to answer under oath interrogatories, to describe records of any and all actions, communications, discussions, recommendations and decisions relating to the plaintiff's employment by the City and its termination and relating to the employment of plaintiff's replacement, Santa Rosa, and to state who

has these records. A copy of this interrogatory is attached to this affidavit.

9. The subject matter requested by plaintiff in the foregoing notices is all directly relevant to plaintiff's employment by the city and the termination of that employment in May, 1970; it is, therefore, all directly relevant to defendants' motions to dismiss or for summary judgment, which are based on the characterization of her position as "unprotected".

10. Contrary to defendants' statement in their moving papers, that "the plaintiff will in no way be prejudiced by receiving the responses after the determination of the motions", these responses now, before that determination, may be important, perhaps crucial, to the determination of the motions.

11. Whatever the outcome of these motions and of the action itself, the defendants will not be prejudiced by the responses and production of records requested by plaintiff.

12. The plaintiff therefore seeks an order directing the defendants forthwith to comply both with the interrogatory pursuant to Rule 33 and the request to produce pursuant to Rule 34.

BENJAMIN PHELOSOF

AFFIDAVIT OF JAMES M. HARTMAN, ESQ. IN OPPOSITION TO PLAINTIFF'S MOTION

(SAME TITLE)

JAMES M. HARTMAN being duly sworn, deposes and says:

1. Deponent is a member of the firm of Harris, Beach and Wilcox, attorneys for defendants William F. Dwyer,

Joseph Sweet, Myron Zeitler and Emilio Serrano and as such he is fully familiar with the facts and circumstances herein and makes this affidavit in opposition to plaintiff's motion for an order directing immediate response to the request to produce and interrogatory.

2. The defendants herein have all moved to dismiss the complaint or for summary judgment and have also moved to enlarge the time to answer or otherwise move with respect to the interrogatory and request to produce.

3. The aforesaid motion is returnable before this Court on the 9th day of November, 1970.

4. The interrogatory directed to defendants William F. Dwyer, Joseph Sweet, Myron Zeitler and Emilio Serrano would require said defendants to expend considerable time and effort in responding thereto and if the aforementioned motion by defendants is granted, responses to the interrogatory would be unnecessary and serve no valid function.

5. The theory of the motion to dismiss or for summary judgment of defendants Dwyer, Sweet, Zeitler and Serrano is that the City of Rochester was authorized and had the power to terminate plaintiff's employment at will and that therefore said defendants could not have wrongfully induced defendants Julian H. Orr and Eugene Tennis to subject plaintiff to the loss of any rights, privileges and immunities secured to her by the Constitution and laws of the United States.

6. Attached to the affidavit of A. Vincent Buzard in support of the motion to dismiss or for summary judgment on behalf of defendants Julian H. Orr, Eugene Tennis and Anne Hasen is a copy of the employment record of plaintiff Daisy Alomar.

7. Said employment record makes it clear on its face that plaintiff Daisy Alomar was a provisional appointee in the employ of the City of Rochester.

8. Any acts, communications, discussions, recommendations or decisions relating to plaintiff's employment by the City or relating to the termination of her employment by the City or relating to the employment of a successor to plaintiff are irrelevant and immaterial to the underlying motion to dismiss or for summary judgment since the City had the right to terminate plaintiff's employment at will because of her provisional status as documented by exhibit "A" attached to the affidavit of A. Vincent Buzard.

9. Plaintiff has failed to allege why or how she will be prejudiced in her opposition to the motion to dismiss or for summary judgment if she does not receive responses to the interrogatory prior to the return date for the aforesaid motion.

10. Defendants William F. Dwyer, Joseph Sweet, Myron Zeitler and Emilio Serrano will be prejudiced if they are required to respond to the interrogatory prior to a determination of their motion to dismiss or for summary judgment. They will be prejudiced in that they would be required to expend considerable time and effort in searching for the records referred to in the interrogatory and in preparing accurate and detailed responses thereto. Furthermore, said defendants would be prejudiced by having to make a public disclosure of private records where the right to inspection of said private records cannot be established until after a determination of said motion to dismiss or for summary judgment. The rights of said defendants to maintain private records must be protected in the absence of any showing of a countervailing right of plaintiff to inquire into said records.

WHEREFORE, your deponent respectfully prays that the court deny the motion of plaintiff Daisy Alomar for an order directing an immediate response to the request to produce and interrogatory, together with the costs of this motion.

JAMES M. HARTMAN

AFFIDAVIT OF A. VINCENT BUZARD, ESQ.

A. VINCENT BUZARD, being duly sworn, deposes and says:

1. That he is First Assistant Corporation Counsel for the City of Rochester and as such is associated with Charles L. Willis, Corporation Counsel, and Attorney for the defendants, Julian H. Orr, Eugene Tennis and Anne Hasen.

2. That he is familiar with the pleadings and proceedings herein and he makes this affidavit in opposition to the motion of the plaintiff.

3. The defendants herein have all moved to dismiss the complaint or for summary judgment and have also moved to enlarge the time to answer or otherwise move with respect to the interrogatory and request to produce.

4. The aforesaid motion is returnable before this Court on the 9th day of November, 1970.

5. That the information sought by the plaintiff in the notices to produce and interrogatories relate primarily to alleged "actions, communications, discussions, recommendations, and decisions" and other relations between officers of the City of Rochester and officers of the Republican Party.

6. That for the purpose of the motions to dismiss and for summary judgment, the defendants are assuming arguendo that said "actions, communications, discussions, recommendations, and decisions" occurred with regard to the termination of the employment of the plaintiff.

7. The position of the defendants for the purpose of the motion to dismiss and for summary judgment is that assuming that said actions did occur, no wrong was committed because her status as an employee of the City of Rochester was unprotected and terminable at will.

8. That the employment record of the plaintiff showing her status as employee has already been provided to the plaintiff in that it was attached to the affidavit of your deponent in connection with the motions to dismiss and for summary judgment.

9. Therefore, the denial of the motion of the plaintiff will in no way prejudice her rights because the information sought is either irrelevant for the purpose of the motion of the defendant or has been provided.

10. That the defendants would, however, be prejudiced by the granting of the motion of the plaintiff in that they would be caused to disclose private and confidential communications in a case with obvious overtones prior to the testing of the sufficiency of the complaint by the motion to dismiss.

11. Therefore, the defendants, Julian H. Orr, Eugene Tennis and Anne Hasen request that the motion of the plaintiff be denied pending the outcome of the motions to dismiss and for summary judgment.

A. VINCENT BUZARD

DECISION

(SAME TITLE)

All of the defendants move for an order dismissing the complaint on the ground that it fails to state a claim upon which relief can be granted or in the alternative for summary judgment on the ground that there is no genuine issue as to any material fact. The motions have been argued orally and written briefs have been filed by all parties. Upon due consideration

IT IS HEREBY ORDERED that the defendants are entitled to summary judgment dismissing the complaint on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

/s/ HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

February 24, 1971.

NOTICE OF APPEAL TO COURT OF APPEALS SECOND CIRCUIT

(SAME TITLE)

Notice is hereby given that Daisy Alomar, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order that the defendants are entitled to summary judgment dismissing the complaint on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law entered in this action on the 25th day of February, 1971.

March 8, 1971.

JUDGMENT OF COURT OF APPEALS

United States Court of Appeals

For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of June one thousand nine hundred and seventy-one.

Present: Hon. J. Edward Lumbard, Hon. Irving R. Kaufman, *Circuit Judges;* Hon. William H. Timbers, *District Judge.*

DAISY ALOMAR,

Plaintiff-Appellant,

vs.

WILLIAM P. DWYER, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant.

A. DANIEL FUSARO,
Clerk

OPINION

(SAME TITLE)

Appeal from the order of the United States District Court for the Western District of New York, Harold P. Burke, *Judge,* granting appellees' motion for summary judgment upon a finding that appellant's complaint alleging that she was discharged from her employment by the City of Rochester because she refused to change her political party affiliation, failed to state a claim upon which relief could be granted.

Affirmed.

PER CURIAM:

We affirmed in open court Judge Burke's dismissal of Daisy Alomar's claim that her discharge by the City of Rochester for refusal to switch her party affiliation failed to state a claim upon which relief could be granted. Alomar claims, *inter alia,* that her discharge deprives her of a First Amendment right of free political association. See *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449 (1957). Her action was brought against appellees Orr, Tennis, and Hasen, who are officials or employees of the City of Rochester ("the Rochester appellees"), and Dwyer, Sweet, Zeitler and Serrano who are local Republican party officials or members ("the Republican appellees").

The new Republican broom which swept into the Rochester City Hall in the spring of 1970 cleaned Democrat Daisy Alomar out. Alomar had been working for the city since October 1967, first as a bilingual stenographer, then as an Assistant Neighborhood Service Representative and finally as a Neighborhood Services Representative at a salary of $10,426. She alleged that her discharge on May 8, 1970,

resulted solely from her refusal to change from the Democratic to the Republican party and her unwillingness to accede to the unofficial requests of the Republican appellees. This allegation, undisputed by appellees, was properly treated by the district court as true on the motion for summary judgment. Judge Burke, however, agreed with appellees' view that since Alomar did not have "protected status" under the Civil Service Law of the State of New York,[1] her employment was terminable at will without notice or hearing[2] and on this ground dismissed the complaint.

Alomar's principal contention is that when this "will" is exercised solely on the basis of her refusal to change her political allegiance to the party of the incumbent administration she is denied a right of free political association. She equates this with her rights of free speech and assembly protected by the First Amendment.

---

[1] Alomar suggests that the grant of summary judgment may have been improper because, as she conclusorily alleges for the first time on this appeal, there are substantial questions of fact concerning her Civil Service Tenure. She did not invoke Civil Service protection below, however, and makes no claim now that she was other than a provisional employee.

[2] Article 13, §2 of the Constitution of the State of New York states that:

> When the duration of any office is not provided by this constitution it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment.

The City Manager (appellee Orr) is granted the authority to remove all subordinate employees of the City except as otherwise provided in the Charter. Article III, §3-3 Charter of the City of Rochester.

The response to appellant's claim is found in *Bailey* v. *Richardson,* 182 F.2d 46, 59 (D.C. Cir. 1950), aff'd, per curiam, 341 U.S. 918 (1950), where the court observed:

> It is next said that the appellant's dismissal impinged upon the rights of free speech and assembly protected by the First Amendment, since the dismissal was premised upon alleged political activity .... But the plain hard fact is that so far as the constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations.

The *Bailey* court teaches that the sole protection for government employees who have been dismissed for political reasons must be found in civil service statutes or regulations. We are not to be understood as saying, however, that in all circumstances may a provisional employee be summarily discharged. We made it clear in *Birnbaum* v. *Trussell,* 371 F.2d 672 (1966) that the discharge of a municipally employed doctor on charges of anti-Negro bias could rise to a violation of due process. We found that Dr. Birnbaum's discharge "involved [more] than merely the loss of the privilege or public employment" and noted that a "discharge for disloyalty . . . may involve legal rights as those in reputation and in eligibility for other employment." See also, *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *McLaughlin* v. *Telindis,* 398 F. 2d 287 (7th Cir. 1968); *Johnson* v. *Branch,* 364 F. 2d 177 (4th Cir. 1966); *Bomar* v. *Keyes,* 162 F.2d 136 (2d Cir. 1947).

The spoils system has been entrenched in American history for almost two hundred years. The devastating effect that such a system can wreak upon the orderly administration of government has been ameliorated to a large ex-

tent by the introduction of the various Civil Service laws. However, it is well understood that the victors will reap the harvest of those public positions still exempt from such laws. Indeed many such positions are exempt because a new administration taking office can only carry out its policies by replacing certain officeholders. If and when additional exempt positions are to be subject to civil service protection is a matter for action by the appropriate municipal and state authorities and not by a federal court.

We have examined appellant's other arguments and find them without merit.

The judgment below is affirmed.

PETITION FOR REHEARING

(SAME TITLE)

The appellant petitions this court for a rehearing of the argument of this appeal heard June 18, 1971. At that time this court from the bench affirmed the district court's summary judgment on defense motions directed against the complaint.

In arguing this appeal on June 18, I failed to place before the court the factual and legal points required for decision. As one result, I permitted the court to misapprehend the facts especially and to see this case erroneously as one of a political appointee attempting to salvage an unprotected city job after she was fired by a new and hostile city administration.

The facts are quite the contrary and, since the judgment appealed from is based on a motion against the complaint, are not in question and should be taken in a light favorable to plaintiff.

The facts here are that the appellant had been employed by the city in community relations since October of 1967 and as a neighborhood service representative since September, 1969 (A-2 and -10). The Republican administration which took office in January, 1970, commended appellant's work (A-3 and -4) and reappointed her to this position of neighborhood service representative in February of 1970 (A-10) although appellant was a Democrat and this was known to respondent Republicans. Several of respondents on several occasions over a period of four months warned appellant that they would have to fire her if she did not change her enrollment (A-3 and -4). It is a fact central to this complaint that appellant was fired because she took no heed of respondents' warnings and continued to exercise her right of free political association, remaining an enrolled Democrat (A-4). Her concern is with this personal constitutional right, not a mere property right. She has been deprived of this personal right by respondents' efforts to coerce appellant's political loyalties, beliefs and actions in requiring her to choose between keeping her job and exercising her right. Further, one need not be very imaginative to perceive the wide *in terrorem* effect this firing had and continues to have on other city employees regardless of the nature of their job tenure. Respondents' deprivation of this personal right of association and beliefs is clearly within the ambit of sections 1983 and 1343.

There is no question here that the actions of respondent municipal officers and political officers were taken under color of state law as well as constituting state actions subject to prohibition by the Fourteenth Amendment.

I also failed in the argument of this appeal to place adequately before the court the legal point that it is not clear what degree of protection the appellant is entitled to under

the New York civil service law. This point is considered in the next page or two and while that degree of protection is primarily relevant to the question of damages, I submit that appellant has a substantial, protected interest recognized by the federal courts. This is true whether her compensatory damages are figured in the hundreds, thousands or tens of thousands of dollars. Moreover, not only appellant and other city employees similarly situated are concerned with her interest in exercising and maintaining her right of free political association; more significant, the public at large has a substantial interest here as well.

In addition this firing for political reasons may have had substantial harmful effects upon appellant's reputation as a community services employee of reasonable loyalty to her employer and even as a person of good character.

With respect to the issue of appellant's civil service status, the facts do not permit the easy conclusion that appellant was a provisional and unprotected employee as respondents argue. Although there is no claim that appellant had taken any competitive examination or been appointed from an eligible list, there is no basis for inferring that a competitive examination had ever been offered to appellant. The facts are that appellant had been employed for over two years by a prior Democratic administration and for four months by the incumbent Republican administration and that this Republican administration commended her work and reappointed her in February 1970.

The New York civil service law, section 65, defines a provisional appointment as one made when there is no appropriate eligible list for a vacancy in the competitive class, following a certification by the civil service commission that the appointee is qualified for the vacancy (paragraph

1.). No such appointment may continue for more than nine months (paragraph 2.) unless an examination fails to produce a list adequate to fill all provisional positions (paragraph 4.). The civil service commission has an express duty to order an examination for any position provisionally held for one month, to prevent the appointment from continuing more than nine months (paragraph 2).

It is axiomatic that these provisions exist not for the benefit of the job holder nor the spoils system, but for that of the public. I submit that when a municipal civil service commission fails in its duty to order an examination, it follows that even one who had been a provisional, unprotected employee attains some albeit small protection from sudden or arbitrary dismissal until an examination may be offered and an eligible list created.

In construing these statutory provisions, one should keep in mind a) that section 107, paragraph 1. of the civil service law outlaws consideration of political opinions or affiliations in removals from office, and b) the leading case, cited by respondents, of *Merriweather v. Roberts,* 268 N. Y. 12 (1935). Here a sharply divided court held that mandamus did not lie to reinstate a provisional bathhouse keeper fired by a new political administration. That bathhouse keeper had not been commended nor been offered the opportunity to keep his job if he changed his enrollment. It is today doubtful that this precedent would be applicable to support respondents' position that appellant was merely a provisional and unprotected employee.

The basic fact of this case is that respondents have exercised coercion under color of state law to deprive appellant and by example others of the right of political association and freedom of belief and action as citizens of this republic.

This court has misapprehended the facts of appellant's case in seeing her as a political hack fighting for a political plum. But appellant's case is entirely different. She has a valid federal cause of action under sections 1983 and 1343.

The interests of the law require the court to look away from lengthening court dockets and to look squarely at the facts of this case. Appellant is entitled to a rehearing.

Respectfully submitted,

BENJAMIN PHELOSOF, ESQ.
Attorney for Appellant
805 Reynolds Arcade Bldg.
Rochester, New York 14614

Dated June 29, 1971.

ORDER DENYING PETITION FOR REHEARING

(SAME TITLE)

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Dated: July 23, 1971

J. EDWARD LUMBARD
IRVING R. KAUFMAN
USC JJ

WILLIAM H. TIMBERS
USDJ

CERTIFICATE OF SERVICE

(SAME TITLE)

I hereby certify that on the ..... day of October, 1971 copies of this petition with appendix were mailed postage prepaid to the Corporation Counsel of the City of Rochester, New York, 46 City Hall, Rochester, New York, attorney for respondents Orr, Tennis and Hasen, and to Harris, Beach and Wilcox, 2 State Street, Rochester, New York, attorneys for respondents Dwyer, Sweet, Zeitler and Serrano. I further certify that all parties required to be served have been served.

.....

BENJAMIN PHELOSOF
Counsel for Petitioner
805 Reynolds Arcade Building
Rochester, New York 14614

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In The

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-568

DAISY ALOMAR,

Petitioner,

vs.

WILLIAM F. DWYER, JULIAN H. ORR, EUGENE TENNIS, ANNE HASEN, JOSEPH SWEET, MYRON ZEITLER and EMILIO SERRANO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS DWYER, SWEET, ZEITLER and SERRANO IN OPPOSITION

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Daily Record Corporation
Rochester, New York
(10052)

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In The

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-568

DAISY ALOMAR,

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WILLIAM F. DWYER, JULIAN H. ORR, EUGENE TENNIS, ANNE HASEN, JOSEPH SWEET, MYRON ZEITLER and EMILIO SERRANO,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR RESPONDENTS DWYER, SWEET, ZEITLER and SERRANO IN OPPOSITION

QUESTION PRESENTED

Does the First Amendment to the United States Constitution prohibit a municipal employer from dismissing from employment a provisional employee because of her refusal to change her political party enrollment?

ARGUMENT

I

The decision of the United States Court of Appeals for the Second Circuit is not in conflict with any applicable decisions of this Court.

Petitioner argues that three recent decisions of this Court hold that the right of association is protected by the First Amendment. In fact, each of the cases cited deals with issues quite different from those raised by this case. *Moore v. Ogilvie,* 394 U.S. 814 (1969) (incorrectly cited by petitioner as *"Monroe" v. Ogilvie*) held that the State of Illinois could not require an equal number of signatures on a petition for nomination of a presidential elector from a sparsely populated county as was required from a populous county. The issue cited by the Court was the one man - one vote rule enunciated originally in *Baker v. Carr,* 369 U.S. 186 (1962).

Similarly *Williams v. Rhodes,* 393 U.S. 23 (1968) also dealt with discriminatory election procedures. In that case the Court struck down an Ohio requirement that any new political party must obtain petitions signed by 15% of the number of ballots cast in the last gubernatorial election whereas established parties were required to obtain the signatures of only 10% of the number of ballots so cast.

Finally, *Bates v. Little Rock,* 361 U.S. 516 (1960) dealt with a local law which required various organizations to disclose their membership lists. The Court held the law unconstitutional since in the case of unpopular organizations, publication of the names of members would inhibit the freedom of individuals to join such groups.

As is apparent, none of these cases cited by petitioner deals with the question raised in this case: can a provisional municipal employee be terminated from her position because of her political affiliations? Neither *Moore* nor *Williams* nor *Bates* speak to that issue but *Bailey v. Richardson*, 182 F. 2d 46 (D.C. Cir. 1950) aff'd 341 U.S. 918 (1951) spoke directly to the question when this Court held therein that the only protection for government employees who have been dismissed for political reasons must be found in civil service statutes or regulations. "In the absence of statute or ancient custom to the contrary, executive offices are held at the will of the appointing authority." *Id.* at 58.

Thus, the issue of political dismissals has been resolved by this Court, but not in the manner suggested by petitioner. The decision of the Court of Appeals below is not in conflict with any applicable decisions of this Court; on the contrary, it relies upon and affirms the decision of this Court in *Bailey*, which decision has, to our knowledge, never been overruled or modified.

II

The decision of the United States Court of Appeals for the Second Circuit is not in conflict with decisions on the same issue in other circuits.

Petitioner relies on three lines of cases to support her contention that the decision below is in conflict with decisions in other circuits. None of the decisions cited in petitioner's brief really deals with the issues involved here. One line of cases concerns the use of public employees in political campaigns, a second line of cases relates to procedural due process in the dismissal of teachers, and the third line of cases

speaks to the right to fire non-tenured employees for their exercise of constitutionally protected privileges.

On the first point, petitioner cites *Shakman v. Democratic Organization,* 435 F. 2d 267 (7th Cir. 1970) cert. den. and *White v. Snear,* 313 F. Supp. 1100 (E.D. Penn. 1970). *Shakman* held that it was unfair to the candidates of a party not presently in power to require municipal employees, as a condition of their employment, to work for the party in power. The *White* decision enjoined county officials from recording as present at their municipal jobs on election day those employees who were absent from their regular jobs in order to work on behalf of the candidates of the party in control. Neither of these cases reaches the question of whether a municipal government of one political party must keep on its payroll a provisional employee enrolled in an opposing party. Both of the cases cited upset abuses of the patronage system; neither of them condemns the system nor comes close to finding it unconstitutional. "Plaintiff does not attack the patronage system itself, . . . and he does not attack the right of county employees actively to support candidates of their choice. . . . What plaintiff does attack is the abuse of the patronage system whereby the weight of state power (here municipal power) is brought to bear directly to effect the outcome of an election." *White, supra* at 1103.

The second line of cases cited in petitioner's brief deals exclusively with the procedural rights of teachers dismissed from their positions. The central issue of these decisions is whether a non-tenured teacher is entitled to be told why he is being dismissed or not rehired and whether he is then entitled to a hearing to air his position in rebuttal. *Drown v. Portsmouth School District,* 435 F. 2d 1182 (1st Cir. 1970), cert. den. and *Roth v. Board of Regents of State Colleges,* 310 F. Supp. 972 (W.D. Wisc. 1970) aff'd 446 F. 2d 806 (7th

Cir. 1971) both recognize a limited right to notice of the reason for dismissal and in *Roth*, the right to a hearing to rebut allegations made by the board of education.

Apparently contra to these decisions is the case of *Orr. v. Trinter*, 444 F. 2d 128 (6th Cir. 1971) in which the Court of Appeals for the Sixth Circuit held that a non-tenured teacher's interest in knowing reasons for non-renewal of contract and in confronting the school board on those reasons was not sufficient to outweigh the interest of the board in free and independent action with respect to the employment of probationary teachers.

These procedural questions are not, however, at issue in this case. Petitioner has at no point demanded a statement as to why she was dismissed nor asked for a hearing. In paragraph 12 of her complaint she merely states as a factual matter that she was fired without notice, charges or hearing. She has never claimed a right to these procedural devices, and she cannot at this late point demand this relief. Moreover, formal notice and hearing would serve no practical function in this instance since, for purposes of this motion, it is admitted that petitioner was dismissed because she refused to change her Democratic Party enrollment. The only question involved here is whether that was a permissible reason for dismissal.

A third line of cases relates to the right of a public employer to dismiss an employee without tenure because of his exercise of constitutionally protected privileges. Petitioner argues that a division exists among the circuits on the propriety of such dismissals, but, if any division does exist, it is over an issue quite different from the one posed by this case.

Five cases are cited by petitioner in which the courts found that a cause of action for dismissal had been stated. *Bomar v. Keyes*, 162 F. 2d 136 (2d Cir. 1947), cert. den. 332

U.S. 825 (1947) was concerned with the right of a female teacher to serve on a federal jury; *Johnson v. Branch,* 364 F. 2d 177 (4th Cir. 1966), cert. den. 385 U.S. 1003 (1967) involved a situation in which the court recognized that the plaintiff had been fired from her teaching position because of racial prejudice; in *McLaughlin v. Telindis,* 398 F. 2d 287 (7th Cir. 1968) the plaintiff teacher was fired because of union activity; *Birnbaum v. Trussell,* 371 F. 2d 672 (2nd Cir. 1966), the only case cited not involving the dismissal of a teacher, concerned, as in *Johnson v. Branch, supra,* dismissal on the grounds of racial prejudice. Finally, petitioner cites *Sindermann v. Perry,* 430 F. 2d 939 (5th Cir. 1970) cert. granted which again involves the dismissal of a teacher. In *Sindermann,* the Court of Appeals for the Fifth Circuit held only that summary judgment should not have been granted since the basic facts were still in dispute. "We explicitly note that we deal only with procedures and not with the merits. The remand for factual explication is made with no intimation whatsoever as to what outcome such further development should produce." *Id.* at 943.

Petitioner then cites three additional dismissal cases in which courts found that no cause of action had been alleged arising out of the dismissals.

In *Parker v. Board of Education of Prince George's County, Maryland,* 348 F. 2d 464 (4th Cir. 1965), cert. den. 382 U.S. 1030 (1966), reh. den. 383 U.S. 939 (1966) plaintiff alleged that his teaching contract with the Board was terminated because he taught from a proscribed book, an alleged violation of his freedom of speech. The court refused to reach the constitutional question and held that its decision rested "entirely on the contract", *Id.* at 465, by the terms of which plaintiff was employed provisionally and without tenure.

Jones v. Hopper, 410 F. 2d 1323 (10th Cir. 1969), cert. den. 397 U.S. 991 (1970) like *Parker v. Board of Education of Prince George's County, Maryland, supra,* was an action wherein a teacher was denied reappointment allegedly because he had exercised his constitutional right of free speech. The court affirmed the dismissal of the complaint on the grounds that the employer board had not exceeded the authority granted to it by the applicable Colorado law in refusing to rehire the plaintiff.

Freeman v. Gould Special School District of Lincoln County, Arkansas, 405 F. 2d 1153 (8th Cir. 1969), cert. den. 396 U.S. 843 (1969) involved a somewhat different issue. There the court saw the dismissal as part of an internal dispute between plaintiff teachers and their principal. The decision in that case specifically noted that no racial issue was present, and that "stripped of the racial issue this case presents no federal question" and the complaint must be dismissed. *Id.* at 1157.

What evolves from an analysis of all of these cases is that a dispute may exist among the circuits over the propriety of dismissals involving deprivation of constitutionally protected rights. But that is not the question here before the Court. Here the issue is whether a provisional public employee has a constitutional right to work for a government administration of one political party while remaining an enrolled member of a competing political party. The rule of law that has evolved on this issue is clear — the courts in none of the circuits have recognized any such right and this Court has specifically held that no such right exists. *Bailey v. Richardson, supra.* Thus, any conflict that may exist among decisions in the circuits in cases involving constitutionally protected rights is irrelevant to this case and presents no basis for a petition for a writ of certiorari.

III

The decision of the United States Court of Appeals for the Second Circuit is not in conflict with any applicable state laws.

Pursuant to Article 3 of the Charter of the City of Rochester (P. 22)*, the City Manager has the power to appoint and discharge employees of the Bureau of Community Relations. §3-3 of the Charter states very clearly that the City Manager

> . . . shall have the power and it shall be his duty . . . to appoint and remove the heads of all departments, the members of all boards, and all subordinate officers and employees, except as otherwise provided in this local law.

Daisy Alomar was a "subordinate employee" in the Bureau of Community Relations and thus subject to discharge by the City Manager.

The authority of the City Manager to terminate petitioner's employment is also set forth in Art. 13, §2 of the New York Constitution (P-15) which states that:

> When the duration of any office is not provided by this constitution it may be declared by law, and if not so declared, such office shall be held during the pleasure of the authority making the appointment.

The City Manager was the "authority making the appointment" and as such he had the right and power to discharge petitioner from the City's employ.

Petitioner has not specified the existence of any contractual or statutory provision to protect her from the

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* Material in parentheses refers to Petitioner's Petition.

City Manager's right to summarily dismiss her. In paragraph 12 of the complaint (P-4a) petitioner alleges that she was fired "without notice, without informing her of any charges or cause, without any hearing and without justification." Yet petitioner fails to allege that she was entitled to notice or a hearing on charges, and in fact, petitioner would not be entitled to notice and a hearing on charges unless she was covered by the statutory protection of the Civil Service Law. Provisional employees as defined and characterized in §65 of the Civil Service Law (P-17) may be dismissed without notice or a hearing on charges.

It is well established law in New York that a provisional employee has no tenure of office, can be removed at will, and is not entitled to any review of his discharge under the Civil Service Law. Matter of *Riggi v. Blessing,* 9 AppDiv2d 423, 195 NYS2d 971 (3rd Dept. 1959), aff'd 10 NY 2d 917, 223 NYS 2d 871 (1962). In *Riggi* the plaintiff held a provisional appointment as Senior Clerk for the City of Schenectady. From the date of his provisional appointment to the date of his discharge, no competitive examination was held although the position was in the competitive class. Nontheless, the Court ruled that *Riggi* could be removed at will and was not entitled to any review of his discharge.

In the often cited case of *Benon v. LaGuardia,* 285 N.Y. 560 (1941) the petitioner was an honorably discharged veteran employed as a junior administrative assistant in the Department of Welfare of the City of New York. He was interrogated about certain charges of misconduct but later cleared of guilt. Nonetheless, he was permanently separated from his employment in the Department. In moving to dismiss the petition defendants submitted an

affidavit alleging that petitioner's status was that of a provisional appointee. The Court of Appeals held that "though after investigation by the Commissioner of Investigations, the petitioner was exonerated from any wrongdoing, we cannot review his dismissal because he had no right of tenure under the Civil Service Law". *Id.* at 561.

Among the long line of cases supporting the rule that provisional appointees are terminable at will is the case of *Schmidt v. Flynn*, 200 NYS2d 1009 (Sup. Ct., Suffolk Co., 1960). Petitioner *Schmidt* alleged that he had been discharged from his employment as water district superintendent "because of a change of political complexion of the Board." The Court held that petitioner "was subject to removal for any cause and the political one is in the traditional exercise of the democratic process which is restricted only by the Civil Service Law and the good judgment of the appointive power." *Id.* at 1012.

In *Merriweather v. Roberts*, 268 N.Y. 12 (1935) the New York Court of Appeals was confronted with the question of whether an employee of the City of Buffalo, in the non-competitive civil service class, could be discharged because of his political affiliations. The court held that he very definitely could be discharged at the will of the municipal employer.

> If every employee or appointee in the classified civil service whose position has been obtained without the requirement of passing a competitive examination were to be accorded upon dismissal the right to mandamus to review the action of the employing officer or board responsible for his discharge upon the sole ground here under consideration, either chaos would result through the flooding of the courts with mandamus proceedings or there would result an extension beyond the clear legislative intent of the tenure of office features of the civil service. *Id.* at 20.

Thus, the decision of the Court below was very much in accord with the applicable law in the State of New York.

Despite the considerable body of New York law which clearly holds that a provisional employee is entitled to no job protection against political dismissals, petitioner points to *Matter of Tischler v. Board of Education of the Monroe Woodbury Central School District No. 1*, 37 App Div 2d 261 (2nd Dept. 1971) and *Rindone v. Kern*, 282 N.Y. 214 (1940) as exceptions to that rule. In fact, neither of these cases is an exception, and neither of them even deal with dismissals for political cause. *Matter of Tischler* involved a probationary teacher allegedly denied tenure as a result of her union activity. The court refused to grant defendant's motion to dismiss for failure to state a cause of action, holding that the complaint alleged a claim under the New York public employee labor laws prohibiting job discrimination on the basis of union activity. In *Rindone* the petitioners were employees in the Department of Welfare who were appointed to their positions through a clerical error. The court there held that the petitioners should be permitted to retain their positions pending the outcome of a special civil service examination prepared to correct the error.

Nothing to which petitioner cites us in the law of New York would prohibit removal from office of a provisional employee for political reasons, and applicable State law presents no basis for the petition herein.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-568

DAISY ALOMAR,

Petitioner,

vs.

WILLIAM F. DWYER, JULIAN H. ORR, EUGENE TENNIS, ANNE HASEN, JOSEPH SWEET, MYRON ZEITLER and EMILIO SERRANO,

Respondents.

BRIEF IN OPPOSITION TO THE WRIT OF CERTIORARI BY DAISY ALOMAR

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ARGUMENT IN OPPOSITION TO THE WRIT OF CERTIORARI

POINT I

Petitioner, as a provisional employee, had no Civil Service protection and, therefore, could be terminated at will.

Petitioner has attempted to raise questions as to the status of provisional employees under New York State Civil Service Law. The rule, however, is well established that provisional appointees have no protected civil service status or rights under New York law. *Kosco v. Green,* 260 NY 491, 184 NE 65, 258 NYS 597, (1933); *Fink v.*

Kern, 176 Misc. 114, at 117, affirmed 262 App. Div. 829, 26 N.Y.S. 2d 891, (Sup. Ct. 1941). This general rule was clearly stated in the case of *Fink v. Kern*, supra, where the court held:

> "It may be observed that the Courts look with disfavor upon an interpretation that tends to include temporary or provisional employees in 'covered in' [Civil Service] groups. Provisional appointees acquire no vested right to appointment to the position merely by virtue of such temporary or provisional service."

In *Schmidt v. Flynn*, 200 NYS 2d 1009, (Sup. Ct. 1960), this rule was applied to facts precisely the same as those in the instant case. The petitioner had been a provisionally appointed superintendent of a water district whose position was in the competitive class of civil service. After being discharged, Schmidt requested the court to compel the dismissal of Schmidt's successor and to compel Schmidt's reinstatement. One of the grounds upon which Schmidt sought this relief was that his firing had been due to a change of the political complexion of his board of superiors. The court, in dismissing that argument as untenable, held that Schmidt, as a provisional appointee, was subject to removal for any cause and that "the political one is the traditional exercise of the democratic process which is restricted only by the Civil Service Law and the good judgment of the appointive power." The right of a government to terminate the employment of an otherwise unprotected employee "for political reasons" was also recognized by the Court of Appeals in *Merriweather v. Roberts*, 268 NY 12, N.E. 621 (1935).

Similarly, in *Mercado v. New York City Youth Board*, 21 Misc. 2d, 228, at 229, 196 N.Y.S. 2d 969, (Sup. Ct. 1959), the petitioner had been provisionally appointed to a posi-

tion as a senior street club worker. After approximately one year of service in this capacity, Mercado was summarily discharged without a hearing. Mercado then proceeded under Article 78 of the Civil Practice Law and Rules of New York to obtain reinstatement to his position. The Court held that "since petitioner did not qualify for his position on the basis of merit pursuant to a competitive test, he acquired no legal rights to the position and was subject to removal at will".

Petitioner has cited two cases which she claims provided protection to provisional appointees. *Rindone v. Kern*, 282 NY 214, 26 N.E. 2d 23 (1940), is cited as authority for the proposition that Daisy Alomar should be reinstated and allowed to take a civil service examination for her former position. The *Rindone* case, however, is in no way analogous to the case at bar. In that case, the plaintiffs were provisional employees who were excluded from taking the civil service examination for the competitive positions to which their provisional appointments were made. The Court ruled that this *exclusion* was improper and that the plaintiffs should remain in their positions until such time as they could take the examination and determine their rank on the eligibility list for appointment. The key distinguishing point in *Rindone* is that a competitive examination was held. In the case at bar petitioner has never alleged that she either took a competitive examination by which she would have gained civil service protection, nor that she was improperly excluded from taking one.

Petitioner also cites the recent decision of the *Matter of Tischler v. Board of Education*, 37 A.D. 2d 261 (2nd Dept. 1971) as standing for the proposition that Section 107 of the Civil Service Law of New York prohibits the termination of provisional employees for their political opinions

or affiliations. The *Tischler* decision involved an action by a non-tenured teacher against a school board for summary termination allegedly due to his union activities. Section 107 of the Civil Service Law of New York was never mentioned in the decision. The Court held that Tischler had a cause of action because of the allegation of violation of his First Amendment right to belong to a union and because failure to grant tenure to a teacher solely because of teachers' union activities was a blatant violation of the Taylor Law, (Civil Service Law of New York, Article 14) which specifically protects the right of New York public employees to organize and join unions.

The United States Court of Appeals for the Second Circuit, after reviewing the New York Civil Service Law and the cases thereunder, ruled that Daisy Alomar was not entitled to any civil service protection of her status as a provisional employee and, therefore, her employment was terminable at will without notice or hearing.

Citing *Bailey v. Richardson*, 182 Fed 2d 46 (D. C. Cir. 1950), aff'd per curiam, 341 US 918 (1950) the Court held that the sole protection for public employees who were terminated for political reasons must be found in the civil service statutes. Daisy Alomar had no protection under the New York Civil Service Law, therefore she could be dismissed for political reasons without notice or a hearing. It has often been held by the Supreme Court, that there is no constitutionally protected right to government employment, and that in the case of an unprotected employee, notice of discharge and a hearing thereon are not required where the only thing at stake is a specific government job.

POINT II

The Decisions of the various Circuits of the United States Court of Appeals are not split on the issue involved in the petition of Daisy Alomar.

Petitioner attempts to have the petition for certiorari granted by asserting that there is a serious split among the Circuits of the Court of Appeals which is relevant to the case at hand. However, none of the cases cited by the petitioner involve the firing of a non-protected public employee because of political enrollment. The cases cited as evidencing the division among the Circuits, *Drown v. Portsmouth School District*, 435 Fed 2d 1182 (1st Cir. 1970), *Sindermann v. Perry*, 430 Fed. 2d 939 (5th Cir. 1970), *Roth v. Board of Regents*, 310 Fed. Supp. 972 (D. Wisc. 1970), *Parker v. Board of Education*, 348 Fed. 2d 464 (4th Cir. 1965), *Freeman v. Gould Special School District*, 405 Fed 2d 1153 (8th Cir. 1969) all involve various activities of school teachers. Furthermore, these cases deal with alleged racial discrimination, retaliation for the exercise of free speech, or retaliation for taking an active role in union activities. That employment issues in the academic world require special consideration was made amply clear in *Johnson v. Branch*, 364 Fed. 2d 177 (4th Cir. 1966), which stated as follows:

> "The Supreme Court has recently had occasion to consider the law in this and analagous areas. It has pointed out on numerous occasions the importance of the teaching profession in our democratic society and the necessity of protecting its personal, associational and academic liberty."

In contrast to the above stated treatment of teachers, the Supreme Court has recognized that no such protection exists for public employees of the executive branch of a

government. For example, in *Bailey v. Richardson,* 182 Fed. 2d 46 (D.C. Cir. 1950), the Court stated as follows:

> "It is next said that appellant's dismissal impringed upon the rights of free speech and assembly protected by the First Amendment, since the dismissal was premised upon alleged political activity. This suggestion goes not to the procedure, but to the ultimate validity of the dismissal itself. But the plain hard fact is that so far as the Constitution is concerned there is no prohibition against the dismissal of Government employees because of their political beliefs, activities or affiliations. That document, standing alone, does not prevent Republican Presidents from dismissing Democrats or Democratic Presidents from dismissing Republicans. From the beginning, such has been the practice, with variations in scope. The reason that it has not continued to so great an extent is because the people became convinced that it was not good government and the Congress and the President wrote that view into statutes and regulations. They, not the Constitution, give Government employees such protection as they have against dismissal for political reasons."

The only authority outside of the academic field cited by petitioner which could be relevant to this case is *Birnbaum v. Trussell,* 371 Fed. 2d 672 (2nd Cir. 1966). In that case, Dr. Birnbaum, a non-protected employee, was summarily discharged from municipal employ without notice or hearing due to his alleged racial discrimination. The court, in that action, held that the summary discharge of a non-protected public employee could violate procedural due process if the discharge would damage a "substantial interest" of the employee other than his desire for a specific job. In Dr. Birnbaum's case, it was found that the circumstances of his discharge would seriously damage his professional reputation and eligibility for other employment because he was discharged for alleged racial discrimination. Therefore, notice and a hearing on the charges were required.

In the instant case, petitioner has made no allegation of an interest of the type found in the Birnbaum case and the Second Circuit, which decided both the Birnbaum case and the instant case must have found no such interest.

CONCLUSION

There is no question that Daisy Alomar was a provisional employee without civil service protection. The Supreme Court in *Bailey v. Richardson* clearly ruled that in the case of executive branch employees, the only source of protection is the civil service law. The petition for certiorari has failed to cite any authorities in the Circuits or elsewhere which are in conflict with that decision or to demonstrate that the holding of the court below is in conflict with that decision. The petitioner asks this court to reverse two hundred years of political history, to in effect accord to all governmental employees civil service protection, and to thus thrust the court into a "political thicket". These hazards were rejected by the Court below and should be rejected now. The petition for certiorari must therefore be denied.

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